

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
BridgeWave Communications, Inc.)	WT Docket No. 11-25
Proposal for Aggregation of Contiguous)	
Channels Over a Single Carrier in the 18)	
GHz Band)	

COMMENTS OF XO HOLDINGS, INC.

XO Holdings, Inc. (“XO”) hereby comments on the proposal of BridgeWave Communications, Inc. (“BridgeWave”) that the Federal Communications Commission (“Commission” or “FCC”) permit fixed users of BridgeWave’s radios to aggregate contiguous channels under Section 101.147(r) of the Commission’s Rules for operation over a single carrier in the 17.7-19.7 GHz band (“18 GHz band”).¹

XO fully supports BridgeWave’s ongoing effort to develop improved equipment for high-capacity backhaul service. As BridgeWave described, radios that provide greater throughput and superior propagation in a cost-effective manner can promote the near-term deployment of 4G networks and other new wireless broadband facilities. XO believes that the development of BridgeWave’s FlexPort family of radios can ultimately

¹ BridgeWave styled its proposal as a request for waiver of Section 101.147(r) of the Commission’s Rules. *See Request for Waiver to Permit Channel Aggregation by Non-MVPD Users of the 18 GHz Band*, BridgeWave Communications, Inc., WT Docket No. 11-25 (May 12, 2010) (“BridgeWave Proposal”). A Public Notice issued by action of the Chief of the Broadband Division of the Wireless Bureau sought comment on BridgeWave’s proposal. *Wireless Telecommunications Bureau Seeks Comment on Request by BridgeWave Communications, Inc. for Waiver to Aggregate Contiguous Channels over a Single Carrier in the 18 GHz Band*, WT Docket No. 11-25, Public Notice, DA 11-401 (March 1, 2011).

increase utilization not only of the 18 GHz band, but also the Local Multipoint Distribution Service (“LMDS”) band and other upper microwave spectrum bands.

While XO supports BridgeWave’s equipment development efforts, it urges the Commission to address BridgeWave’s rechannelization proposal as part of its comprehensive look at spectrum used for wireless backhaul and in a rulemaking proceeding, rather than as a request for waiver. Section 101.147(r) of the Commission’s rules establishes a maximum bandwidth of 80 MHz per channel in the 18 GHz band. BridgeWave proposes that the Commission allow users of its 18 GHz radios to create 150 MHz channels that can be transmitted with a single carrier by aggregating three contiguous 50 MHz channels. BridgeWave’s proposal is, in effect, a proposal to amend the Commission’s 18 GHz channelization rule. If the Commission (or a Bureau or Division) permits the users of BridgeWave’s radios to so aggregate channels, it is difficult to see how the 18 GHz channelization rule could be applied to other users. The Commission’s channelization rule would be eviscerated.²

The courts and the Commission itself have consistently found that the FCC cannot amend its rules through the waiver process. As the U.S. Court of Appeals for the D.C. Circuit found in *WAIT Radio*, “the agency’s observance of its obligation to give

² Absent the necessary justification, the Commission must provide similar regulatory treatment to similarly-situated entities under its jurisdiction. The Commission abuses its discretion if it does not “provide adequate explanation before it treats similarly situated parties differently.” *Petroleum Commc’ns, Inc. v. FCC*, 22 F.3d 1164, 1172 (D.C. Cir. 1994). See also *Burlington N. & Santa Fe Ry. Co. v. Surface Transp. Bd.*, 403 F.3d 771, 777 (D.C. Cir. 2005) (“Where an agency applies different standards to similarly situated entities and fails to support this disparate treatment with a reasoned explanation and substantial evidence in the record, its action is arbitrary and capricious and cannot be upheld.”); *Chadmoore Commc’ns, Inc. v. FCC*, 113 F.3d 235, 242 (D.C. Cir. 1997); *Adams Telecom, Inc. v. FCC*, 38 F.3d 576, 581 (D.C. Cir. 1994); *McElroy Elecs. v. FCC*, 990 F.2d 1351, 1365 (D.C. Cir. 1993); *Melody Music, Inc. v. FCC*, 345 F.2d 730, 732-33 (D.C. Cir. 1965).

meaningful consideration to waiver applications emphatically does not contemplate that an agency must or should tolerate evisceration of a rule by waivers.”³ As the Commission did in its 18 GHz Rechannelization Proceeding, the Commission should address the instant 18 GHz rechannelization proposal in a rulemaking proceeding.⁴

In August 2010, the Commission initiated a broad rulemaking proceeding to amend its Part 101 Rules to increase efficient use of spectrum for wireless backhaul and provide more flexible use of microwave frequencies for backhaul.⁵ The Commission should consider BridgeWave’s 18 GHz rechannelization proposal in that rulemaking or pursuant to a Further Notice of Proposed Rulemaking in that docket.⁶

³ *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969). See also *EchoStar Corporation; Application to Operate a C-Band Geostationary Satellite Orbit Satellite in the Fixed-Satellite Service at the 84.9 [degrees] W.L. Orbital Location*, Memorandum Opinion and Order, 25 FCC Rcd 10193, ¶ 19 (IB 2010) (denying request for waiver of rule restricting the assignment of new orbital locations following a licensee’s pattern of missed milestones, based in part on fact that a waiver would “eviscerate” the rule); *Waiver of the Commission’s Access Charge Rules; Bell Atlantic Telephone Companies Petition for Waiver of Part 69.112(b) and (c) of the Commission’s Rules to Offer Facilities Management Service*, Order, 12 FCC Rcd 10196, ¶ 5 (CCB 1996) (“Where a waiver is found to be in the public interest, it is generally expected that the waiver will not be so broad as to eviscerate the rule. Rather, the request must be tailored to the specific contours of the exceptional circumstances.”) (footnote omitted).

⁴ *Rechannelization of the 17.7-19.7 GHz Frequency Band for Fixed Microwave Services Under Part 101 of the Commission’s Rules*, Report and Order, 21 FCC Rcd 10900 (2006) (“18 GHz Rechannelization Order”). The Commission initiated its rulemaking proceeding on 18 GHz rechannelization issues in response to filings from the Fixed Wireless Communications Coalition and the National Spectrum Managers Association, including a petition for reconsideration as well as a joint request for waiver from those parties. *18 GHz Rechannelization Order* ¶ 9 n.22.

⁵ *Amendment of Part 101 of the Commission’s Rules to Facilitate the Use of Microwave for Wireless Backhaul and Other Uses and to Provide Additional Flexibility to Broadcast Auxiliary Service and Operational Fixed Microwave Licensees*, Notice of Proposed Rulemaking and Notice of Inquiry, 25 FCC Rcd 11246 (2010).

⁶ BridgeWave stated that it was looking forward to working with the Commission and other interested parties in the wireless backhaul rulemaking to develop permanent

XO also urges the Commission to address the spectrum assignment issues it has raised in that proceeding.⁷ As it did in its earlier comments, XO urges the Commission to reexamine its policy of making common carrier spectrum available in a manner that neither promotes efficient spectrum use nor captures the value of this spectrum for the United States Treasury. XO reiterates its recommendation that the Commission explore whether it would now be appropriate to assign licenses in the common carrier spectrum bands through competitive bidding, or to impose spectrum usage fees to encourage greater spectrum efficiency and associate a direct economic cost with any inefficient spectrum use.⁸ With such action, the Commission would encourage the full, efficient use of all commercially licensed spectrum.

The Commission should address BridgeWave's 18 GHz rechannelization proposal as part of its comprehensive review of wireless backhaul rules, rather than as a waiver. The issues are too important to leave to ad hoc waivers and policymaking. Wireless

channel aggregation rules that will optimize the 18 GHz band and other Part 101 spectrum for high-capacity backhaul services. BridgeWave Proposal at 5.

⁷ Comments of XO Communications, LLC, WT Docket No. 10-153 (Oct. 25, 2010) ("XO Comments").

⁸ See XO Comments at 2-4.

backhaul solutions are critical to the deployment of wireless broadband and will be a key factor in promoting robust competition in the wireless marketplace.

Respectfully submitted,

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March 15, 2011

Certificate of Service

I hereby certify that on this 15th day of March, 2011, I caused a true and correct copy of the foregoing Comments of XO Holdings, Inc. to be mailed by electronic mail to:

Best Copy & Printing, Inc.
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Additionally, I caused a true and correct copy of the foregoing Comments of XO Holdings, Inc. to be mailed by first class U.S. mail, postage prepaid, to:

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